IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 113 OF 2005

Aminuddin Amiruddin Sheikh .. Applicant

Vs.

M/s. Mature Trading & Investments Pvt. Ltd. .. Respondent

Mr. H.S.S. Murthy i/by V.L. Panjuani for applicant.
Mr. C.S. Balsara i/by A.S. Dayal & Associates for Respondent.

CORAM : B. H. MARLAPALLE,J.

Date : February 24, 2006.

P.C.:

1. This is an application for appointment of the sole Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

2. The applicant claims that he is the sole proprietor of a firm by name and style as "ART International" and its quotation submitted for the work of the respondent i.e. the work of External Cladding of Granite and Shon Tiles for the "Fortune 2000" at Bandra Kurla Complex was accepted as per the letter dated June 8, 1999 forwarded to the applicant by M/s. Kadri Consultants Pvt. Ltd. who are the Architects engaged by the respondent. The applicant

claims that the contract work was completed prior to 27/6/2000 and final bills for a gross recovery amount of Rs.1,41,95,517/- were certified by the Architects of the respondent. The final certificate purportedly issued by the respondent's Architects indicated that the total balance payment due to the applicant was to the tune of Rs.26,38,953.65 paise only and out of the said amount the Architects certified an "on account payment" of Rs.20,71,173/- as per the 6th and final certificate issued by them. The respondent paid an amount of Rs.5 lacs against the final bill and, therefore, the applicant registered a protest vide its letter dated 17/8/2001. It is further claimed that inspite of reminders there was no response from the respondent or their Architects. Vide letter dated 11/3/2000 the respondent was finally informed regarding the further steps for recovery of the amount as per the provisions of the contract. The applicant claims that "Part-II Special Conditions" to the Contract/Quotation contained the following clause for arbitration:-

> "v. All disputes and differences arising out of the contract shall be referred to the joint Arbitration of Arbitrators, one to be appointed by the Owner and one by the Contractor. The Arbitrators so appointed

shall be Fellows of the Institution of Engineers (India). The Owner and the Contractor also agree that Arbitration under this condition shall be a condition precedent to any right of action under the contract."

3. The respondent-firm has filed its reply and has contended that the contract between the parties as accepted as per the communication dated 8/6/1999 addressed by its Architects does not provide for a Clause of arbitration and, therefore, this application cannot be entertained under Section 11 of the Act. As per the respondent the so called Part-II Special Conditions was not part of the quotation submitted by the applicant and accepted by the respondent through their Architects. The stand of the respondent has been supported by the Architects i.e. M/s. Kadri Consultants Pvt. Ltd. by filing an affidavit.

4. The learned counsel for the applicant referred to the letter dated 16/3/2002 addressed to the respondent and submitted that in the said letter there was a clear reference to Clause (v) of Part-II Special Conditions of Contract and the applicant had clearly indicated its intentions to invoke the said clause for arbitration and the reply given by the respondent vide

its letter dated 29/4/2002 did not specifically state that Part -II Special Conditions was not part of the quotation. A reference was also made to the subsequent communication dated 24/1/2003 whereby earlier correspondence was referred to between the parties and appointment of Mr. S.R. Hosalkar, Fellow of the Institution of Engineers was shown to be the nominee Joint Arbitrator of the applicant. The respondent by its letter dated 11/2/2003 intimated that there was no provision for arbitration in the contractual terms signed between the parties and, therefore, there was no question of appointment of Arbitrator from its side. Similar correspondence went on between the parties till 4/6/2003 and finally this application under Section 11 of the Act has been presented to this court on 10/6/2005 i.e. almost after two years.

5. Both the parties have placed before me the alleged original copies of the contract terms in their possession. The office copy submitted by the applicant does have "Part-II Special Conditions" and it contains Clause (v) providing for arbitration. As against this, the original submitted by the respondent does not have "Part -II Special Conditions" but it does have "Part-II other terms and conditions" containing about 11 terms and conditions and none of

them speak about arbitration between the parties for resolving the disputes, if any. The original submitted by the respondent also has one more page of the terms and conditions submitted by the applicant and the same page is missing from the office copy placed before me by the learned counsel for the applicant. It has also to be noted that the finalisation of the offer submitted by the applicant and its acceptance has been communicated to it by M/s. Kadri Consultants Pvt. Ltd., the Architects of the respondent and the Architects on affidavit have stated before this court that the arbitration clause does not find place in the terms of the contract accepted between the parties and communicated vide their letter dated 8/6/1999.

6. In these obtaining circumstances, I hold that the parties are at variance regarding the existance of an arbitration clause in the contract and though they have tried to support respective contentions by placing on record copies of the respective documents, it being a disputed question of fact, it cannot be gone into in this application. Unless it is admitted between the parties regarding a provision of arbitration in the business contract, it will not be safe for this court to entertain an application under Section 11 of the Act. There is another facet which

requires to be mentioned in this case. If the applicant has invoked the arbitration clause vide its letter dated 16/3/2002, this application filed on 10/6/2005 is beyond time i.e. after three years.

7. In the premises, the application is hereby rejected and the parties are left to the civil remedy for resolving the disputes.

(B.H. Marlapalle, J.)